raising money, the option should not be refused, in an appropriate case."

A bankrupt is not denied all means of raising money but he is denied the means of raising money, by obtaining credit unless he fulfils a vital condition by disclosing to the lender the fact that he is an undischarged bankrupt, and this condition the present respondent did not fulfil.

I have intimated before that in my view the offence of which the respondent has been convicted is more appropriately punished with imprisonment than with fine.

On adjudication the respondent's property vested in the Official Assignee and this applies to property acquired after the adjudication and prior to discharge. He is allowed the necessary expenses of maintenance of himself and his family and although a small fine might be paid out of such alimentary allowance, it is improbable that the bankrupt would have such a margin as would allow of a heavy fine being paid.

The fine may therefore be expected to be paid by some one else or be derived from funds which should be available for creditors.

I therefore think that it should be only in very exceptional cases that the sentence should be a fine rather than imprisonment.

The second point in the grounds of sentence to which exception can be taken was that Theng Kwee Teng knew that if the accused's interests proved valueless, his main chance of obtaining repayment was from the guarantor. This only shews that Theng Kwee Teng did not regard the loan as a safe one. The security was in fact worse than he supposed and such security as he has got in the guarantor he got through the respondent inducing Tipaldo to go surety without informing him that he (the respondent) was an undischarged bankrupt. The offence was committed notwithstanding the security. *Fryer*, 7 Cr. App. R., 183.

These circumstances do not appear to me to lessen the guilt of the respondent.

Mr. Morrison said that the conviction carries with it a further penalty. By section 33(4) the Court cannot now grant the respondent his discharge. If this is an additional penalty it is one imposed by the Ordinance and it makes no difference that the punishment for an offence is contained in two sections instead of in one. The punishments are cumulative not alternate.

I think a fine of $100 for criminally obtaining $500 is an inadequate sentence even after taking into consideration all that can be said in mitigation.

In *Abdul Rahman* v. *Public Prosecutor of Johore* 7 M.L.J., 219 the Court of Appeal in Johore said "we will be following the more modern practice if, in suitable cases, we reduce or enhance sentences when, having before us all the material which the trial Judge had before him, we consider, having regard to all the circumstances of the case, that the sentence imposed is manifestly excessive or inadequate.'

This $500 is lost whether the loss falls on the lender or on the surety and that loss is occasioned by the respondent's offence. A fine of $100 leaves him with a handsome profit.

I think the fine manifestly inadequate.

I set it aside and sentence the respondent to one month simple imprisonment. The fine, if it has been paid is to be repaid.

As I consider I am enhancing the sentence I have leaned heavily towards moderation. It must not be understood that one months's imprisonment is to be regarded as a standard punishment for this offence.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J. TERRELL, Ag. C.J. (F.M.S.) & HORNE, J.

February 15, 1939.

REX v. LEE HOEY.

[SINGAPORE MAGISTRATE'S APPEAL No. 11 of 1939]

Chandu Revenue Ordinance (Cap. 223, s. 11, sub-s. 3 (b)—Possession of non-Government Chandu.

Section 11, sub-s. 3(b) of the Chandu Revenue Ordinance contains no such word as "knowingly" and provides no defence for a person infringing it. If an accused knows that he is in possession of Chandu and takes the risk of it being (and in fact it is) non-Government chandu he is guilty of an offence against the section. A bona fide but mistaken belief that chandu dross was the dross of Government chandu is a matter which the Court can take into consideration in assessing punishment.

MAGISTRATE'S APPEAL.

The accused in person.

Butterfield for the Crown.

Cur. Adv. Vult.

McELWAINE, C.J.—This is an appeal by the Crown from an acquittal. The matter first came before me as a special case stated under section 317 of the Criminal Procedure Code by L. B. Gibson Esq., District Judge at Singapore, but as it was intimated that the Crown desired me to overrule a decision of Howes J. I considered that the case should be heard by a Court of three Judges and that as there is some question as to whether a special case can be heard by three Judges, I gave leave to the Crown to bring an ordinary appeal out of time so the appeal came on before a Court of three Judges under section 306 (3) of the Criminal Procedure Code.

The respondent was charged that he, on the afternoon of the 11th day of October, 1938, did

have in his possession at Queen Street Chandu Shop 4 tahils 8 chis of non-Government chandu, and did thereby commit an offence under section 11 (3) (d) and punishable under section 12 of the Chandu Revenue Ordinance (Chapter 223).

The learned District Judge found as a fact—and the evidence supported this finding—that the respondent offered for sale at a Government Chandu Shop 4 tahils 8 chis of chandu dross which was not the dross of Government chandu. He also found that in offering the dross for sale the respondent did not know that it was the dross of non-Government chandu.

As the learned District Judge considered that Howes J. in *Rex* v. *Tan Hoay*, 7 M.L.J. 216 had decided that innocent possession was a defence to the charge, and that the defendant's possession was innocent by reason of his ignorance of the nature of the dross he acquitted the respondent.

The Chandu Revenue Ordinance (Chapter 223) by section 11 (3) enacts that:

> "No person shall, except as permitted by this Ordinance or by any rules made thereunder (d) have in his possession, custody or control any chandu other than Government chandu."

"Chandu" and "Government chandu" are defined as including chandu dross and dross derived from Government chandu respectively.

Section 11 (3) contains an absolute prohibition. The subsection contains no such word as "knowingly" which may be found coupled with other prohibitions in the Ordinance as for example, in section 12 (1) (b) 18 (1) (b) nor does it contain a defence such as is to be found in section 13 (b) "unless he satisfies the Court that he acted innocently."

As Howes J. said in *Rex* v. *Tan Hoay*, (*supra*) "It (i.e. the subsection) is an absolute prohibition by the legislature, such as occurs in several statutes of this nature, where revenue or excise is concerned." Then having referred to *Sherras* v. *De Rutzen* (1893) 1 Q.B., at 921, he proceeded "As I have already said, the section is prohibitive: No person shall have in his possession, custody or control. If qualifying words such as 'knowingly' or 'intentionally' were included, then the prosecution would have to prove knowledge or intention on the part of the accused."

Then came the passage which caused the District Judge to acquit "Consequently, once the possession, custody or control of the chandu was proved (or as in this case, admitted) the onus of proof shifted, and it becomes the duty of the appellant to satisfy the learned District Judge that such possession was innocent."

I think the word "innocent" an unfortunate one to use and it makes the paragraph I have just quoted a *non sequitur* to what preceded it. The report of the case does not set out the argument but the judgment sets out the evidence for the defence which the District Judge had rejected and it is possible that the defence had attempted to bring the case within the principle I enunciated in *Chiah Tian* v. *Rex*, (1937) S.S. L.R. 50; 6 M.L.J. 105, that "possession to be an offence must be possession under such circumstances that a Court is justified in finding that the accused was conscious of the possession." "There must be some evidence from which it can reasonably be inferred that the accused knew the general nature of the thing alleged to be in his possession." In *Chiah Tian's* case the evidence indicated that a wrapped up parcel containing dutiable liquor was handed to the girl by a rickshaw coolie and was in her hands for a matter of seconds when the revenue officers seized it. There was nothing to suggest that she knew the parcel contained liquor of any kind.

If it was in this sense that the learned Judge used the word 'innocent'—really indicating that there was no possession at all, or that the possession was innocent—because the accused had discharged the onus placed on him by section 11 (7) and had proved that the chandu was a Government chandu and not non-Government chandu as charged, the paragraph is a correct statement of law. If, however, the learned Judge really meant that when a man is proved knowingly to have chandu in his possession he is entitled to be acquitted if he proves that he did not know it was non-Government chandu, he would in my opinion have been wrong, but I am not satisfied that this is what he meant.

'Mens rea' which is regarded as an essential ingredient in crime has a very much wider connotation when used in connection with offences which are or were ordinary common law crimes involving moral turpitude than it has in the case of prohibitions imposed by statute for the public weal the infraction of which may not offend the moral sense. In both, the voluntary doing of an act is essential but while in the former the offender must know that what he is doing is unlawful and consequently he must be conscious of a wrongful intention or of a probable wrongful consequence (as in cases of negligence), in the latter case the voluntary (as distinct from the accidental) doing of the act forbidden is in itself sufficient to constitute the offence even if the offender is not aware that the particular matter in respect of which the act is done is of a nature different from what he supposes it to be.

In these cases of absolute prohibition *mens rea* has been called "an intention to do an act forbidden by statute." *Rex* v. *Wheat*, (1921) 2 K.B. 419. Sometimes the Courts have used the phrase '*mens rea*' in connection with absolute prohibition as if it meant conscious guilt as where Channell J. in *Pearks, Gunston & Tees, Limited* v. *Ward*, (1902) 2 K.B. 1 says:

> "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not and whether or not he intended to commit a breach of the law."

but this is merely denying that consciousness of wrong doing is essential ingredient of the offence of voluntarily doing an act which is absolutely prohibited.

In *Gotterill* v. *Penn*, (1936) 1 K.B. 53 Lord Hewart said in connection with an absolute prohibition:

> "The element of *mens rea* is not required beyond the point that the facts must shew an intention on the part of the person accused to do the act forbidden—in the present case the shooting. It seems to me quite immaterial that he thought he was shooting a bird different from the kind which he in fact did shoot."

This is the principle of The *Queen* v. *Prince*, 2 C.C.R., 154 (abduction of girl under sixteen); *Reg.* v. *Forbes* 10 Cox C.C., 362 (assault on constable in execution of his duty); *Reg.* v. *Bishop* 5 Q.B.D., 269 (receiving lunatics); *Parker* v. *Alder* (1899) 1 Q.B. 20 (adulteration of milk); *Cundy* v. *Le Cocq* 13 Q.B.D. 207 (selling drink to intoxicated persons); *Rex* v. *Duke of Leinster* (1924) 1 K.B. 311 (bankrupt obtaining credit); *Rex* v. *Maughan* 24 Cr. App. R. 130 (indecent assault on girl under sixteen); *Chajutin* v. *Whitehead* (1938) 1 K.B. 506 (possession of an altered passport); *Rex* v. *Larsonneur* 24 Cr. App. R. 74 (alien brought to England); *Chong Kwong* v. *Public Prosecutor* (1933) F.M.S.L.R. 337 (sale of adulterated chandu dross); *Rex* v. *Kiat*, 7 M.L.J. 150 (muzzling of dogs); *Rex* v. *Woodrow* 16 L.J.M.C., 122, 15 M. & W. 404 (adulterated tobacco) which closely resembles the present case in its facts; and these illustrations might be multiplied. I content myself by quoting the words of Atkin J. (as he then was) in *Mousell Brothers* v. *London & North-Western Railway* (1917) 2 K.B. at 845:—

> "I think that the authorities cited by my Lord make it plain that while *prime facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed. If authority for this is necessary it will be found in the judgment of Bowen L.J. in *Reg.* v. *Tyler* (1891); 2 Q.B. 588."

and of Scrutton L. J. in *In re Mahmoud and Ispahani* (1921) 2 K.B. at 728:—

> "Where the prohibition is for public purposes as a general rule, unless there is the word 'knowingly' or something to shew that the offence can only be committed by a person who knows he is committing an offence, the person must take the risk. He must make such enquiries as will shew him whether or not he is violating the prohibition in the statute."

The whole purpose of the Chandu Revenue Ordinance is strictly to control sale and possession of chandu. The long title of the Ordinance is "To give the Government the exclusive right to prepare and sell chandu." Section 11 (3) contains no such word as 'knowingly' and provides no defence for a person infringing it. Indeed, it is not even incumbent on the Crown to prove that the chandu is non-Government chandu. The subsection creates an absolute prohibition.

Here the respondent knew he was in possession of chandu dross and he took the risk of its being (what in fact it was) non-Government chandu dross so he is guilty of an offence against the section. Of course, *bona fide* through mistaken belief that the dross was the dross of Government chandu is a matter which the Court can take into consideration in assessing punishment.

The Crown has made it plain that this appeal is brought—not for the purpose of punishing the respondent but for the purpose of getting rid of doubts to which *Rex* v. *Tan Hoay* (*supra*) has given rise.

The appeal is allowed. The respondent did not know the dross was dross of non-Government chandu. He has been at the trouble and loss of twice attending this Court and we propose under all the circumstances to impose the purely nominal penalty of a fine of five cents.

TERRELL, AG. C.J. (F.M.S.)—I have had the advantage of reading the judgment of the learned President of the Court with which Horne J. concurs. I respectfully agree with this judgment, and the grounds upon which it is based, and only wish to add a few words.

It appears to me that exactly the same point arose in the case of *Ong Aik Phow* v. *Rex*, 6 M.L.J. p. 73 in which Whitley Ag. C.J. reviewed all the authorities which were cited to the Court on the present appeal. That was a case of importing rubber into the Colony in excess of the quantity authorised by the import permit, issued under the Rubber Regulation Ordinance 1934. It was held, that as the wording of the section indicated an absolute prohibition, it was unnecessary for the prosecution to prove *mens rea*. Whitley Ag. C.J. further held that where the importation had been established, it was not open to the accused to prove that he acted innocently. It is not therefore merely a question of shifting the onus.

In the later case of *Rex* v. *G. H. Kiat*, 7 M.L.J. p. 151, which arose in connection with the Rules made under the Quarantine and Prevention of Diseases Ordinance, I followed the decision of Whitley Ag. C. J., and held that the same principles applied, the prohibition being absolute. The decision of Whitley Ag. C.J. was in September 1936, and my decision in March 1938, and I consider it unfortunate that Crown Counsel, who quoted so carefully the relevant English authorities, had no note of the local decisions. It is also unfortunate that these decisions were not brought to the attention of Howes J. when the case of *Rex* v. *Tan Hoay*, (7 M.L.J. p. 216) came before him in September 1938. If these cases had been cited to him, the terms of his judgment might well have been modified, and the learned District Judge would not have felt compelled to acquit on account of dicta which were not in fact necessary to the decision in *Rex* v. *Tan Hoay*, with the result that the present appeal to a full Court need not have been brought.

I agree with the order proposed by the learned President of the Court.

HORNE, J.—I have read the Judgment of the Chief Justice and I agree with it.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

REX v. CHEONG KONG SENG.

[SINGAPORE MAGISTRATE'S APPEAL No. 97 of 1938]

Municipal Ordinance (*Cap. 133*), *s. 211, sub-s. 1* (*d*).

Sect. 211, sub-s. 1 (d) of the Municipal Ordinance is intended to protect people from what the legislature has considered to be a nuisance caused by the burning of earth or lime by their neighbours whether the finished product is called a brick or a tile. If tiles are manufactured by a firing process by the burning of earth or lime an offence has been committed under the section.

MAGISTRATE'S APPEAL.

Dr. Withers-Payne for the Crown.

L. C. Chidson for Appellant.

Cur. Adv. Vult.

McELWAINE, C.J.—The respondent was charged with using his premises for the purpose of making bricks without first obtaining a licence from the Municipal Commissioners, contrary to section 211 (1) (d) of the Municipal Ordinance (Chapter 133).

The magistrate found as a fact (which was not controverted) that there was abundant evidence that the premises had been used for making tiles and that there was no evidence that they had been used for making bricks. As he was of opinion that the making of tiles was no offence under the section he acquitted the accused without calling upon him for his defence, without hearing Dr. Withers Payne and without waiting for Mr. Chidson to submit there was no case.

The Crown appealed and the Public Prosecutor authorised Dr. Withers Payne to conduct the appeal under section 402 (6) of the Criminal Procedure Code.

The section under which the respondent was charged, so far as immediately material, reads as follows:—

> 211 (1). No place shall be used within the Municipality for any of the following purposes:
>
> (d) making bricks, pottery or lime;
>
> (q) any other manufactory or place of business from which either offensive or unwholesome smells arise;
>
> (r) any purpose calculated to be dangerous to life or property;